Supreme Court, U.S.
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No. 01-977

In the Supreme Court of the United States

KENNETH G. HELFRICH,
Petitioner,

v.

PNC BANK, KENTUCKY, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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799

TABLE OF CONTENTS

Table of Authorities ii

Petitioner's Reply to Respondent's Brief in Opposition . 1

Reasons for Granting the Writ 2

I. Respondent agrees the Sixth Circuit's decision conflicts with this Court's decisions and decisions from other Circuits 2

II. *Great-West* is inapplicable in the present situation since it relates to a fiduciary bringing suit to enforce a beneficiary's contractual obligation under §502(a)(3) for money due and owing under a contract 3

Conclusion 5

TABLE OF CITED AUTHORITIES

Cases

Great-West Life & Annuity Ins. Co v. Knudson,
___ U.S. ___, 122 S.Ct. 708 (2002) . . . 1, 3, 4, 5

Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc.,
530 U.S. 238 (2000) 4

Kerr v. Vatterott & Co.,
184 F.3d 938 (8th Cir. 1999) 2

Mertens v. Hewitt,
508 U.S. 248 (1993) 5

Reich v. Continental Casualty Co.,
33 F.3d 754 (CA7 1994) 3

Strom v. Goldman, Sachs & Co.,
202 F.3d 138 (2d Cir. 1999) 2

Varity Corporation v. Howe,
516 U.S. 489 (1996) 1, 3, 4

Other

1 D. Dobbs, Law of Remedies §4.1(2),
p. 557 (2d ed. 1993) 4

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

1. The Respondent admits in its brief there is a dispute among the circuits regarding the present issue. See Respondent's Brief at p. 5.

2. *Great-West Life & Annuity Ins. Co v. Knudson*, ___ U.S. ___, 122 S.Ct. 708 (2002) is irrelevant to the case at hand. *Knudson* held a fiduciary could not bring suit to enforce a beneficiary's contractual obligation under §502(a)(3) because a claim for money due and owing under a contract is "quintessentially an action at law" and where there was arguably an available remedy outside of ERISA's provisions. 122 S.Ct. at 713. Here, Petitioner, a beneficiary, seeks an equitable remedy to provide relief where no other remedy exists and the sole question is what constitutes appropriate equitable relief in light of Petitioner's lack of alternative remedies, per *Varity Corp. v. Howe*, 516 U.S. 489 (1996). 122 S.Ct. 719, n. 5.

3. This Court has already held §502(a)(3) authorizes lawsuits by beneficiaries for individualized equitable relief for breach of fiduciary obligations and offering appropriate equitable relief for injuries caused by violations that §502 does not elsewhere adequately remedy. *Varity* at 507-515. Respondent, once again, admitted the Petitioner would have recourse through a relief, an injunction,"typically available in equity that §502(a)(3) allows.[1] Respondent Brief p. 6, n. 4.

[1] As the Respondent points out, this Court must assume the facts alleged by Helfrich to be true. Accordingly, whether Helfrich is entitled to relief based on satisfying his burden of proof is immaterial. Based on the facts Helfrich alleged, and this Court must assume, he, if provided with full information, would have been

REASONS FOR GRANTING THE WRIT

I. Respondent agrees the Sixth Circuit's decision conflicts with this Court's decisions and decisions from other Circuits.

The Respondent agrees that courts outside the Sixth Circuit have addressed the issue and there is a conflict among the Circuits. Respondent Brief, p.5. The Respondent suggests the Sixth Circuit properly applied the law, which begs the question of the need for this Court to review the case. While the Petitioner disagrees with the Sixth Circuit's ruling, Respondent's argument seems to suggest disputes between the Circuits are to be resolved by a party to an action who claims the lower Circuit held appropriately in their favor.

This Court should note the following. The Second Circuit's holding that a monetary "make whole" remedy was available to plaintiff under § 502(a)(3)(B) "*to eliminate the direct economic effect*" of a fiduciary's breach of the terms of the plan is in direct contradiction with the Sixth Circuit's holding in this case. *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138 (2d Cir. 1999). Further, the Eighth Circuit did authorize restitutionary award as a corollary to an injunction which restored plan participants to the position they would have occupied had the breach never occurred and "respectfully disagreed" with the Third Circuit's holding on the same issue *Kerr v. Vatterott & Co.*, 184 F.3d 938 (8th Cir. 1999). It is clear from the District Court's opinion that other circuits would not hold in similar fashion as the Sixth

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entitled to an injunction. Without full information, Petitioner could not assert his right to an injunction, which is the precise reason for the genesis of this suit.

Circuit. There is a definite conflict between the Circuits, and, a writ should be granted so the Court can resolve these issues.

II. *Great-West* is inapplicable in the present situation since it relates to a fiduciary bringing suit to enforce a beneficiary's contractual obligation under §502(a)(3) for money due and owing under a contract.

Here, the Respondent asserts *Great West, supra*. is controlling. *Great West* does not answer the questions raised here. Great West held a fiduciary seeking to enforce its contract, "quintessential action at law", for money owed or due under a subrogation agreement could not pursue under §502(a)(3). Here, Petitioner seeks the ability to pursue a remedy when no other remedy exists. Since an injunction, which is an "inherently equitable remedy"[2], was unavailable due to the Respondent's lack of providing full information, the Petitioner seeks an "appropriate relief, in light of the apparent lack of remedies."[3]

Whether a claim is legal or equitable depends on the basis for [the plaintiff's] claim and the nature of the underlying remedies sought. *Great West*, 122 S.Ct. at 714 (citing *Reich v. Continental Casualty Co.*, 33 F.3d 754 (CA7 1994)). Even though this Court has already determined an injunction was "inherently equitable" and that "restitution against a transferee of tainted plan assets is 'appropriate equitable relief' within the meaning of §502(a)(3)", the Respondent urges the Court to foreclose any right of recovery

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[2] *See Great West*, 122 S.Ct. at 713, n. 1

[3] *See Great West*, 122 S.Ct. at 719, n.5 (citing *Varity*, 516 U.S. at 508)

by a plan participant for a direct violation of ERISA. *Id.* at 715 (citing *Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000)). In *Great West*, the plaintiff sought entitlement of funds for benefits conferred pursuant to its contract. In this instance, Petitioner's claim is for a make-whole remedy to cure the Respondent's unauthorized use of Petitioner's funds where no other remedy exists. This Court has held it is "not aware of any ERISA-related purpose that denial of a remedy would serve." *Varity*, 516 U.S. at 515.

Respondent's central argument has shifted from whether the equitable relief requested by the Petitioner is considered "ill-gotten profits" to whether the Petitioner's funds are in Respondent's possession. First, "the fundamental substantive basis for restitution is that the defendant has been unjustly enriched by receiving something, tangible or intangible, that properly belongs to the plaintiff."[4](emphasis added). Second, at the time of the breach the funds were in the Respondent's possession and the Petitioner was entitled to an injunction. The Respondent's urges the Court hold that ERISA is not only predicated on the designation of the defendant, but also on the timing and availability of information at the time of suit.[5]

Based on the Respondent's rationale, any fiduciary wishing to insulate itself from ERISA liability could do so by not informing the plan participant of its actions and

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[4] *Id.* at 723 (citing 1 D. Dobbs, Law of Remedies §4.1(2), p. 557 (2d ed. 1993)).

[5] *See* Justice Ginsberg's dissent at *Great West*, 122 S.Ct. 721 stating "Under that view, whether relief is 'equitable' would turn entirely on the designation of the defendant"

subsequently transferring the funds to a third-party. While "ERISA's carefully crafted and detailed enforcement scheme may provide strong evidence that it did not intend to authorize other remedies", clearly it was not promulgated to promote actions in accord with Respondent's rationale nor abolish all remedies for injured plan participants. Here, the Petitioner's state law claims have been pre-empted by ERISA, and the "nature of the underlying remedies sought" sound in equity. While Respondent wishes to stretch the applicability of two cases deciding narrow issues (*Mertens* and *Great West*), this Court has already determined that the Petitioner is entitled to a remedy.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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